

In the Matter of Remedial Action by:	AGREED ORDER
Port of Tacoma and USG Interiors, Inc.	No. DE 3405

TO:

Port of Tacoma  
P. O. Box 1837  
Tacoma, WA 98401-1837  
Attn: Suzanne Dudziak

USG Interiors, Inc.  
125 South Franklin Street  
Department 176  
Chicago, IL 60606  
Attn: Lanita Stevens

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## **I. INTRODUCTION**

The mutual objective of the State of Washington, Department of Ecology (Ecology), Port of Tacoma (the Port), and USG Interiors, Inc. (USG) under this Agreed Order (Order) is to provide for remedial action at a facility where there has been a release or threatened release of hazardous substances. The Port and USG are collectively referred to in this order as the PLPs. This Order requires the PLPs to supplement existing Remedial Investigations of the facility and develop a Feasibility Study. The Feasibility Study will be used to determine a preferred cleanup strategy. Ecology believes the actions required by this Order are in the public interest.

## **II. JURISDICTION**

This Agreed Order is issued pursuant to the authority of the Model Toxics Control Act (MTCA), RCW 70.105D.050(1).

## **III. PARTIES BOUND**

This Agreed Order shall apply to and be binding upon the Parties to this Order, their successors and assigns. The undersigned representative of each Party hereby certifies that he or she is fully authorized to enter into this Order and to execute and legally bind such Party to comply with the Order. The PLPs agree to undertake all actions required by the terms and conditions of this Order. No change in ownership or corporate status shall alter the PLPs' responsibility under this Order. The PLPs shall provide a copy of this Order to all agents, contractors, and subcontractors retained to perform work required by this Order, and shall ensure that all work undertaken by such agents, contractors, and subcontractors complies with this Order.

## **IV. DEFINITIONS**

Unless otherwise specified herein, the definitions set forth in Chapter 70.105D RCW and Chapter 173-340 WAC shall control the meanings of the terms used in this Order.

1. Site: The Site has been referred to in the past as USG Interiors, and is currently listed on the Washington State Hazardous Sites List as the Thermafiber, LLC Site (Site).

The Site is generally located at 2301 Taylor Way in Tacoma, Washington. The Site is defined by the extent of contamination caused by the release of hazardous substances at the Site. Based upon factors currently known to Ecology, the Site is more particularly described in Exhibit A to this Order, which includes a detailed Site diagram. The Site constitutes a Facility under RCW 70.105D.020(4).

2. Parties: Refers to the Washington State Department of Ecology, Port of Tacoma, and USG.

3. PLPs: Refers to Port of Tacoma and USG.

4. Agreed Order or Order: Refers to this Order and each of the exhibits to the Order. All exhibits are integral and enforceable parts of this Order. The terms "Agreed Order" or "Order" shall include all exhibits to the Order.

## V. FINDINGS OF FACT

Ecology makes the following findings of fact, without any express or implied admissions of such facts by the PLPs:

1. USG owned and operated a rock wool production facility at 2301 Taylor Way in Tacoma, Washington (Taylor Way Property) between 1959 and 1996. One of the raw materials used in the rock wool manufacturing process was copper smelter slag from the nearby Asarco copper smelter. The slag and its byproducts typically contain levels of arsenic, antimony, lead, copper, zinc, and other heavy metals above the MTCA Cleanup Standards for soils, unrestricted land use.

2. The Site is located within the boundaries of the Commencement Bay Nearshore/Tideflats (CBN/T) Superfund site. The remedial actions for contaminated sediments and upland source control within the CBN/T site are documented in a Record of Decision (ROD), dated September 30, 1989. Upland Source Control was identified as operable unit number 5 under the ROD, and jurisdiction for source control was assigned to Ecology under a cooperative agreement between the United States Environmental Protection Agency (EPA) and Ecology dated June 30, 1989. The Site is adjacent to the Head of Hylebos Waterway Problem Area in the CBN/T Superfund site. Ecology's

primary involvement in the Site was to address source control needs under the ROD. Ecology's Source Control Status Report for the Head of Hylebos Waterway Problem Area, dated June 14, 2000, stated that source control was achieved in the Head of Hylebos Problem area. EPA concurred with this determination. However, the Site continues to be of concern to Ecology under MICA due to the presence of contaminated soil, and potential for discharge of contaminated groundwater to the Hylebos waterway.

3. In 1973, USG reportedly scraped baghouse dusts and spent shot from the Taylor Way Property and removed the material to two sites referred to by USG and Ecology as "the Highway 99 site" and "the Puyallup site." In 1984, USG voluntarily excavated the materials from the two dump sites and sent them to Chem Security Services, Inc., a hazardous waste management facility at Arlington, Oregon. The vertical and lateral extent of the soil scraping on the Taylor Way Property in 1973 was not documented.

4. A bank seep sample obtained from the Taylor Way Property by EPA in 1980 contained levels of arsenic, copper, lead, nickel, zinc, and mercury which indicated the Taylor Way Property may be a source of contamination to the Hylebos Waterway. In 1992, Ecology, in cooperation with USG, took a bank seep sample, storm drain sample, a sediment sample, and three soil/waste material samples at the Taylor Way Property. The samples showed releases of antimony, arsenic, copper, lead, zinc, chromium, nickel, silver, and mercury from the Taylor Way Property's stormwater, tidal seeps, shoreline sediments, and within soils. The samples were taken as part of Ecology's efforts to control sources of contaminants to the Hylebos Waterway problem area of the Commencement Bay Nearshore/Tideflats Superfund site.

5. Ecology entered into Agreed Order No. DE 93TC-S163 (1994 Agreed Order) with USG on March 1, 1994, for USG to conduct a Phased Remedial Investigation and Feasibility Study (RI/FS). The initial tasks for the phased RI/FS were to carry out an Ecology-approved work plan for a Phased Remedial Investigation, develop a public participation plan, submit a draft and final work plan for cleaning the storm drain system at the Taylor Way Property, and submit a Stormwater Pollution Prevention Plan.

6. In a letter dated May 12, 1995, Ecology agreed to allow USG to pursue interim actions on the Site to control sources of sediment pollution to Hylebos Waterway. Although the 1994 Agreed Order referenced an RI/FS, it was determined that a feasibility study was not needed to move forward with the interim actions and a feasibility study was never required by nor submitted to Ecology. Ecology subsequently entered into two amendments to the 1994 Agreed Order, dated August 10, 1995, and May 13, 1996. The first amendment to the Order required USG to develop an Interim Action Plan for removal of a contaminated soil berm at the north property boundary. It also required USG to develop and implement plans to investigate contaminated waste materials and soils present within the Hylebos Waterway embankment, address heavy metals contamination in stormwater runoff, improve waste management procedures to prevent discharge to the waterway, prevent discharge of contaminated groundwater through the storm drainage system, reduce potential groundwater contamination through application of appropriate infiltration controls, and conduct confirmational monitoring. Although the first amendment discussed implementation of the work through a consent decree, a consent decree was never filed and the work was completed under the first amendment. The second amendment required removal of the contaminated berm, excavation of contaminated soil in the embankment, implementation of the paving and stormwater drainage plans, and confirmational/performance monitoring.

7. A summary of the reports developed under the 1994 Agreed Order and Amendments, and the interim actions completed are attached as Exhibit B to this Order. Although USG completed interim actions to prevent recontamination of the sediments in Hylebos Waterway, Ecology did not consider the interim actions to be the final cleanup actions for the Site, and the Site remains on Ecology's Hazardous Sites List.

8. USG sold the Taylor Way Property to Thermafiber, LLC, in the spring of 1996. Thermafiber, LLC and its successor Thermafiber, Inc. (collectively "Thermafiber") owned the Taylor Way Property from 1996 through 2002, and operated the rock wool production

facility during that time. The Port purchased the Taylor Way Property from Thermafiber on December 19, 2002.

9. In December 2002, Kennedy Jenks Consultants produced a Phase I and Limited Phase II Environmental Site Assessment for the Port of Tacoma, which discusses soil and groundwater contamination on the Taylor Way Property. In November 2003, Kennedy Jenks Consultants produced the Former Thermafiber Site, Soil Removal and Waste Disposal Report. The Report documents removal of a railroad berm by Thermafiber that contained high levels of arsenic, although no confirmation samples were obtained from the footprint. At approximately the same time buildings located on the site were removed by Thermafiber. The Report also documents the 2003 excavation of an area containing diesel and heavy oil between the former buildings and an area where other hydrocarbon-contaminated soils were removed in 1997. These actions were conducted as independent remedial actions by Thermafiber pursuant to the Purchase and Sale Agreement between Thermafiber as Seller and the Port of Tacoma as Buyer.

10. In September – November 2004, Kennedy Jenks Consultants collected soil samples from underneath a proposed building footprint at the Taylor Way Property. The samples indicated that arsenic was present in soils at up to 1,100 mg/kg. Two localized areas of soil within the building footprint were excavated up to 3 feet deep, but no confirmation samples were obtained. The entire building footprint area was subsequently covered with several feet of imported soils, upon which the building would be constructed above the existing Taylor Way Property grade. In April 2005, the Port of Tacoma installed five test pits around the edge of the imported soil to attempt to identify if arsenic remained in the soils underneath the building location. Samples from the test pits indicate that some arsenic above the MTCA, Method C, industrial cleanup level remains in soils beneath the building footprint. These actions were conducted as independent remedial actions.

11. In June 2005, USG excavated soils up to 6 feet deep in two areas of the Taylor Way Property where higher levels of arsenic had been identified in the Phase I and Limited Phase II Environmental Site Assessment. These areas are adjacent to the soil removal from

an earlier interim action conducted under the 1994 Agreed Order. These actions were conducted as independent remedial actions by USG. The excavation report has been submitted to Ecology and will be reviewed formally when Ecology reviews the PLPs' supplemental RI report.

12. In August 2005, the Port of Tacoma removed two underground storage tanks as an independent remedial action. Reports required for documenting removal of underground tanks were submitted to Ecology on November 14, 2005. The UST removal reports will be reviewed formally when Ecology reviews the PLPs' supplemental RI report.

13. USG currently operates under the protection of Chapter 11 of the United States Bankruptcy Code.

14. As set forth in Exhibit B, data about the Site have been generated, and certain interim actions have been completed. However, soil and groundwater contamination remain on the Site. A full remedial investigation, including an assessment of potential sources, pathways, and receptors of contaminants has not been completed. Additionally, no feasibility study (WAC 173-340-350(8)) or Cleanup Action Plan (WAC 173-340-380) have been produced.

## **VI. ECOLOGY DETERMINATIONS**

1. The Port of Tacoma is an "owner or operator" as defined in RCW 70.105D.020(12), of a "facility" as defined in RCW 70.105D.020(4) because the Port of Tacoma is the current owner of the Taylor Way Property, located at 2301 Taylor Way, Tacoma, Washington.

2. USG is the former owner of the facility, and owned and operated the facility at the time of disposal and release of hazardous substances.

3. Based upon all factors known to Ecology, a "release" or "threatened release" of "hazardous substance(s)" as defined in RCW 70.105D.020(20) and RCW 70.105D.020(7), respectively, has occurred at the Site.

4. By letter dated May 19, 1993, Ecology notified USG of its status as a "potentially liable party" under RCW 70.105D.040 after notice and opportunity to comment.

5. Based upon credible evidence, Ecology issued a potentially liable person status letter to the Port of Tacoma dated September 17, 2004, pursuant to RCW 70.105D.040, RCW 70.105D.020(16), and WAC 173-340-500. After providing for notice and opportunity for comment, reviewing any comments submitted, and concluding that credible evidence supported a finding of potential liability, Ecology issued a determination that the Port of Tacoma is a potentially liable person (PLP) under RCW 70.105D.040 and notified the Port of Tacoma of this determination by letter dated December 9, 2004.

6. Pursuant to RCW 70.105D.030(1) and -.050(1), Ecology may require PLPs to investigate or conduct other remedial actions with respect to any release or threatened release of hazardous substances, whenever it believes such action to be in the public interest. Based on the foregoing facts, Ecology believes the remedial action(s) required by this Order is(are) in the public interest.

## **VII. WORK TO BE PERFORMED**

Based on the Findings of Fact and Ecology Determinations, it is hereby ordered that the PLPs take the following remedial actions at the Site and that these actions be conducted in accordance with Chapter 173-340 WAC unless otherwise specifically provided for herein:

### **1. Supplemental Remedial Investigations (RI)**

#### **A. Scope of Work**

Considerable environmental investigations and localized soil removal and cleanup have been performed on the Site. However, work is needed to fill information gaps in previously submitted data and to prepare a feasibility study. The PLPs have prepared a Work Plan and schedule to fill the data gaps and finalize the Site remedial investigations. The Work Plan includes a worker safety and health plan, pursuant to WAC 173-340-810. A copy of the Work Plan and schedule is attached as Exhibit C. Exhibit C is incorporated by reference and is an integral and enforceable part of this Order. The PLPs shall perform the actions in the attached Work Plan and prepare a feasibility study as outlined below.

B. Deliverables and Schedules

1. The schedule for the work and reporting for the supplemental remedial investigation (RI) is set forth in the work plan attached as Exhibit C, and summarized here:

a) Groundwater sampling: The PLPs will complete groundwater sampling within 150 days of the effective date of this Order. The PLPs will submit the results to Ecology within 14 days of receiving final results from the laboratory.

b) Soil Sampling Plan.

- Scope of Work: The PLPs shall submit the Scope of Work for soil sampling within 30 days of submitting the groundwater sampling laboratory results to Ecology. If there is more than one set of groundwater sampling laboratory results, the PLPs shall submit the Scope of Work for soil sampling within 30 days of submitting the last groundwater sampling laboratory results to Ecology.
- Draft Work Plan: Within 45 days of Ecology's approval of the scope of work.
- Final Work Plan: Within 15 days of Ecology's comments on the draft work plan.

c) Supplemental RI Phase I report.

- Draft: Within 100 days from Ecology's approval of the final Soil Sampling Work Plan
- Final: The report shall be subject to Ecology's review. Ecology will provide comments on the Draft RI Phase I report to the PLPs and the parties will establish a mutually agreed upon date for the PLP's resubmittal of the RI report. If Ecology determines that no further action is necessary, upon Ecology's approval, this RI report will be the final RI report for the Site.

## d) Supplemental RI Phase II Plan:

- As set out in Exhibit C, if Ecology determines it to be necessary, based on the results and conclusions from the phase I work conducted under Exhibit C, the PLPs shall submit a Phase II work plan to Ecology within 30 days of a written request by Ecology. The plan shall include a schedule for completion of the work and submittal of the RI Phase II report. The plan is subject to Ecology's approval. If Ecology determines no further sampling is needed after Phase I, the PLPs shall not be required to submit a Phase II plan.

## e) Supplemental RI Phase II report

- The PLPs shall submit a draft report in accordance with the approved work plan schedule mentioned in paragraph VII.1.B.1(d), above, summarizing the results of the Phase I sampling results and explaining the results of the Phase II sampling. The Draft RI Phase II report shall be subject to Ecology comment and approval. Ecology will provide comments on the Draft RI Phase II report to the PLPs and the parties will establish a mutually agreed upon date for the PLP's resubmittal of the RI report. Upon Ecology's final approval, this RI report will be considered the final RI report for the Site.

2. Progress Reports: The PLPs shall keep Ecology apprised of the progress of the work plan activities through email or written correspondence, at a minimum of once a month.

3. Laboratory results: The PLPs shall provide laboratory results for soil and water analysis to Ecology within 14 days of receiving final results from the laboratory.

4. Hydrogeologic monitoring: The PLPs shall provide results of the water level monitoring and slug tests, along with a draft map of groundwater flow patterns, to Ecology within 30 days of conducting said monitoring.

5. Electronic Data Submittal: Pursuant to WAC 173-340-840(5), the PLPs shall submit all soil and groundwater sampling data to Ecology according to the requirements of Ecology's Policy 840 Data Submittal Requirements. The electronic data for each required phase of the supplemental RI shall be submitted according to the same schedule as the written reports.

2. **Feasibility Study (FS)**

A. **Scope of Work**

The PLPs shall develop an outline for a feasibility study (FS) report to evaluate cleanup action alternatives. Based on Ecology's review and approval of the FS outline, the PLPs shall produce a FS report that follows the requirements of WAC 173-340-350(8).

B. **Deliverables and Schedule**

1. Outline: The PLPs shall submit a draft outline and schedule for the FS report to Ecology at the same time as the Draft Supplemental RI Phase I Report, described above in paragraph VII. 1. B. 1. c. The outline shall notify Ecology of the different clean up options the PLPs will be evaluating in the FS report. The FS outline and schedule will be subject to Ecology's approval. A final FS outline and schedule shall be submitted within 30 days of receiving Ecology's comments on the draft FS outline.

2. FS Report: Based on the results of the RI report(s), described above in paragraphs VII. 1. B. 1.c. and e., the PLPs shall produce a draft FS report in accordance with WAC 173-340-350(8). The draft FS report shall be delivered to Ecology within 60 days of Ecology's approval of the final FS outline and schedule. The draft FS report shall be subject to Ecology comment and approval. Ecology will provide comments on the draft FS report to the PLPs and the parties will establish a mutually agreed upon date for the PLP's resubmittal of the final FS report.

### 3. **Progress**

If, at any time after the first exchange of comments on drafts, Ecology determines that insufficient progress is being made in the preparation of any of the deliverables required by this section, Ecology may complete and issue the final deliverable after 30 days prior notice to the PLPs, unless the PLPs issue the final deliverable within 30 days of Ecology's notice.

## **VIII. TERMS AND CONDITIONS OF ORDER**

### 1. **Public Notices**

RCW 70.105D.030(2)(a) requires that, at a minimum, this Order be subject to concurrent public notice. Ecology shall be responsible for providing such public notice. Ecology reserves the right to modify or withdraw any provisions of this Order should public comment disclose facts or considerations which indicate to Ecology that the Order is inadequate or improper in any respect.

### 2. **Remedial Action Costs**

The PLPs shall pay to Ecology costs incurred by Ecology pursuant to this Order and consistent with WAC 173-340-550(2). These costs shall include work performed by Ecology or its contractors for, or on, the Site under Chapter 70.105D RCW, including remedial actions and Order preparation, negotiation, oversight, and administration. These costs shall include work performed both prior to and subsequent to the issuance of the Order. The PLPs shall pay the required amount within ninety (90) days of receiving from Ecology an itemized statement of costs that includes a summary of costs incurred, an identification of involved staff, and the amount of time spent by involved staff members on the project. A general description statement of work performed will be provided upon request. Itemized statements shall be prepared quarterly. Pursuant to WAC 173-340-550(4), failure to pay Ecology's costs within ninety (90) days of receipt of the itemized statement of costs will result in interest charges at the rate of twelve percent (12%) per annum, compounded monthly.

3. **Implementation of Remedial Action**

Except where necessary to abate an emergency situation, the PLPs shall not perform any remedial actions at the Site outside those remedial actions required by this Order, unless Ecology concurs, in writing, with such additional remedial actions.

4. **Designated Project Coordinators**

Ecology:

Joyce Mercuri, Site Manager  
Toxics Cleanup Program  
Southwest Region  
Department of Ecology  
P. O. Box 47775  
Olympia, WA 98504-7775  
(360) 407-6260  
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The project coordinator(s) shall be responsible for overseeing the implementation of this Order. The Ecology project coordinator will be Ecology's designated representative for the Site. To the maximum extent possible, communications between Ecology and the PLPs, and all documents, including reports, approvals, and other correspondence concerning the activities performed pursuant to the terms and conditions of this Order shall be directed through the project coordinator(s).

Ecology and the PLPs may change their respective project coordinator(s), but must provide ten (10) days advance written notification of the change to the other party.

## 5. Performance

All work performed pursuant to this Order shall be under the direction and supervision, as necessary, of a licensed professional engineer or licensed hydrogeologist, or equivalent as approved by Ecology, with experience and expertise in hazardous waste site investigation and cleanup. USG's designated professional engineer, Martin Carlson of CDM, has been approved by Ecology. The PLPs shall notify Ecology in writing of the identity of any other such engineer(s), or hydrogeologist(s), or others, and of any contractors and subcontractors to be used in carrying out the terms of this Order, in advance of their involvement at the Site.

Any construction work performed pursuant to the Order shall be under the supervision of a professional engineer or a qualified technician under the direct supervision of a professional engineer. The professional engineer must be registered in the State of Washington, except as provided in RCW 18.43.130.

## 6. Access

Ecology or any Ecology authorized representative shall have the full authority to enter and freely move about all property at the Site that the PLPs either own, control, or have access rights to at all reasonable times for the purposes of, *inter alia*: inspecting records, operation logs, and contracts related to the work being performed pursuant to this Order; reviewing the PLPs' progress in carrying out the terms of this Order; conducting such tests or collecting such samples as Ecology may deem necessary; using a camera, sound recording, or other documentary type equipment to record work done pursuant to this Order; and verifying the data submitted to Ecology by the PLPs. The PLPs shall make all reasonable efforts to secure access rights for those properties within the Site not owned or controlled by the PLPs where remedial activities or investigations will be performed pursuant to this Order. If the PLPs are unable to secure necessary access rights, pursuant to WAC 173-340-800(8), Ecology shall make reasonable efforts to facilitate access to real property for PLPs conducting remedial actions under this Order. Ecology or any Ecology authorized representative shall give reasonable notice before entering any Site property

owned or controlled by the PLPs unless an emergency prevents such notice. All persons who access the Site pursuant to this paragraph shall comply with the approved health and safety plan, if any. Ecology employees and their representative shall not be required to sign any release or waiver as a condition of Site property access.

7. **Sampling, Data Reporting, and Availability**

With respect to the implementation of this Order, the PLPs shall make the results of all sampling, laboratory reports, and/or test results generated by them or on their behalf available to Ecology and shall submit these results in accordance with this Section and Section VII of this Order. All sampling data shall be submitted to Ecology in both printed and electronic formats in accordance with 173-340-840(5) WAC and Ecology Toxics Cleanup Program Policy 840: Data Submittal Requirements.

If requested by Ecology, the PLPs shall allow split or duplicate samples to be taken by Ecology and/or its authorized representative of any samples collected by the PLPs pursuant to implementation of this Order. PLPs shall notify Ecology a minimum of seven (7) days in advance of any sample collection or work activity at the Site (unless 7 days advance notice is not practicable, in which case PLPs shall give as much advance notice as is reasonably practicable). Ecology shall, upon request, allow split or duplicate samples of any samples collected by Ecology pursuant to the implementation of this Order to be taken by the PLPs or its authorized representative provided it does not interfere with Ecology's sampling. Without limitation on Ecology's rights under Section VIII. 6. of this Order, Ecology shall notify the PLPs prior to any sample collection activity unless an emergency prevents such notice.

In accordance with WAC 173-340-830(2)(a), all hazardous substance analyses shall be conducted by a laboratory accredited under Chapter 173-50 WAC for the specific analyses to be conducted, unless otherwise approved by Ecology.

8. **Public Participation**

Pursuant to 173-340-600(9) WAC and 173-340-600(11)(a) WAC, a public participation plan is required for this Site. Ecology shall review any existing public

participation plan to determine its continued appropriateness and whether it requires amendment, or if no plan exists, Ecology shall develop a public participation plan alone or in conjunction with the PLPs.

Ecology shall maintain the responsibility for public participation at the Site. However, the PLPs shall cooperate with Ecology, and shall:

A. If agreed to by Ecology, develop an appropriate mailing list, prepare drafts of public notices and fact sheets at important stages of the remedial action, such as the submission of work plans, remedial investigation/feasibility study reports, cleanup action plans, and engineering design reports. As appropriate, Ecology will edit, finalize, and distribute such fact sheets and prepare and distribute public notices of Ecology's presentations and meetings;

B. Notify Ecology's project coordinator prior to any of the following: the issuance of all press releases; distribution of fact sheets; performance of other outreach activities; meetings with the interested public and/or local governments associated with this Order. Likewise, Ecology shall notify the PLPs prior to the issuance of all press releases and fact sheets, and before meetings with the interested public and local governments. For all press releases, fact sheets, meetings, and other outreach efforts by the PLPs that do not receive prior Ecology approval, the PLPs shall clearly indicate to their audience that the press release, fact sheet, meeting, or other outreach effort was not sponsored or endorsed by Ecology;

C. When requested by Ecology, participate in public presentations on the progress of the remedial action at the Site. Participation may be through attendance at public meetings to assist in answering questions, or as a presenter;

D. When requested by Ecology, arrange and/or continue information repositories to be located at the following locations:

Citizens for a Healthy Bay  
917 Pacific Avenue Suite  
Tacoma, WA 98402

Tacoma Public Library -- Main Branch  
Northwest Room  
1102 Tacoma Avenue South  
Tacoma, WA 98402

Ecology's Southwest Regional Office  
300 Desmond Drive  
Lacey, WA 98503

At a minimum, copies of all public notices, fact sheets, and press releases; all quality assured monitoring data; remedial action plans and reports, supplemental remedial planning documents, and all other similar documents relating to performance of the remedial action required by this Order shall be promptly placed in these repositories.

9. **Retention of Records**

During the pendency of this Order and for ten (10) years from the date of completion of work performed pursuant to this Order, the PLPs shall preserve all records, reports, documents, and underlying data in their possession relevant to the implementation of this Order and shall insert a similar record retention requirement into all contracts with project contractors and subcontractors. Upon request of Ecology, the PLPs shall make all records available to Ecology and allow access for review within a reasonable time.

10. **Resolution of Disputes**

A. In the event a dispute arises as to an approval, disapproval, proposed change, or other decision or action by Ecology's project coordinator, or an itemized billing statement under Section VIII.2 (Remedial Action Costs), the Parties shall utilize the dispute resolution procedure set forth below.

1. Upon receipt of the Ecology project coordinator's decision, the PLPs have fourteen (14) days within which to notify Ecology's project coordinator of its objection to the decision.

2. The Parties' project coordinators shall then confer in an effort to resolve the dispute. If the project coordinators cannot resolve the dispute within fourteen (14) days, Ecology's project coordinator shall issue a written decision.

3. The PLPs may then request Ecology management review of the decision. This request shall be submitted in writing to the Southwest Region Toxics Cleanup Section Manager within seven (7) days of receipt of Ecology's project coordinator's decision.

4. The Section Manager shall conduct a review of the dispute and shall endeavor to issue a written decision regarding the dispute within sixty (60) days of the PLPs' request for review. The Section Manager's decision shall be Ecology's final decision on the disputed matter.

B. The Parties agree to only utilize the dispute resolution process in good faith and agree to expedite, to the extent possible, the dispute resolution process whenever it is used.

C. Implementation of these dispute resolution procedures shall not provide a basis for delay of any activities required in this Order, unless Ecology agrees in writing to a schedule extension.

11. **Extension of Schedule**

A. An extension of schedule shall be granted only when a request for an extension is submitted in a timely fashion, generally at least thirty (30) days prior to expiration of the deadline for which the extension is requested, and good cause exists for granting the extension. All extensions shall be requested in writing. The request shall specify the reason(s) the extension is needed. The request shall specify:

- (i) The deadline that is sought to be extended;
- (ii) The length of the extension sought;
- (iii) The reason(s) for the extension; and
- (iv) Any related deadline or schedule that would be affected if the extension were granted.

B. The burden shall be on the PLPs to demonstrate to the satisfaction of Ecology that the request for such extension has been submitted in a timely fashion

and that good cause exists for granting the extension. Good cause includes, but is not limited to:

- (i) Circumstances beyond the reasonable control and despite the due diligence of the PLPs including delays caused by unrelated third parties or Ecology, such as (but not limited to) delays by Ecology in reviewing, approving, or modifying documents submitted by the PLPs or delays in performing work on Site property not owned by the PLPs and for which access is unreasonably denied by a third party; or
- (ii) Acts of God, including fire, flood, blizzard, extreme temperatures, storm, or other unavoidable casualty; or
- (iii) Endangerment as described in Section VIII 13 of this Order.

However, neither increased costs of performance of the terms of this Order nor changed economic circumstances shall be considered circumstances beyond the reasonable control of the PLPs. Further, delays in performing work on Site property not owned by the PLPs and for which access is unreasonably denied by a third party shall not necessarily constitute good cause for extending the schedule for performing work on Site properties to which the PLPs own or have access.

C. Ecology shall act upon any written request for extension in a timely fashion. Ecology shall give the PLPs written notification in a timely fashion of any extensions granted pursuant to the Order. A requested extension shall not be effective until approved by Ecology. Unless the extension is a substantial change, it shall not be necessary to amend this Order pursuant to Section VIII 12 when a schedule extension is granted.

D. An extension shall only be granted for such period of time as Ecology determines is reasonable under the circumstances. Ecology may grant schedule extensions exceeding ninety (90) days only as a result of:

- (i) Delays in the issuance of a necessary permit which was applied for in a timely manner;
- (ii) Other circumstances deemed exceptional or extraordinary by Ecology; or
- (iii) Endangerment as described in Section VIII 13 of this Order.

## 12. **Amendment of Order**

The project coordinators may verbally agree to minor changes to the work to be performed without formally amending this Order. Minor changes will be documented in writing by Ecology within seven (7) days of verbal agreement.

Except as provided in Section VIII.14 of this Order, substantial changes to the work to be performed shall require formal amendment of this Order. This Order may only be formally amended by the written consent of both Ecology and the PLPs. The PLPs shall submit a written request for amendment to Ecology for approval. Ecology shall indicate its approval or disapproval in writing and in a timely manner after the written request for amendment is received. If the amendment to the Order represents a substantial change, Ecology will provide additional public notice and opportunity to comment. If Ecology does not agree to a proposed amendment, the disagreement may be addressed through the dispute resolution procedures described in Section VIII.10 of this Order.

## 13. **Endangerment**

In the event Ecology determines that any activity being performed at the Site is creating or has the potential to create a danger to human health or the environment on or surrounding the Site, Ecology may direct the PLPs to cease such activities for such period of time as it deems necessary to abate the danger. The PLPs shall immediately comply with such direction.

If, for any reason, the PLPs determine that any activity being performed at the Site is creating or has the potential to create a danger to human health or the environment, the PLPs may cease such activities. The PLPs shall notify Ecology's project coordinator as soon as possible, but no later than twenty-four (24) hours after making such determination

or ceasing such activities. Upon Ecology's direction the PLPs shall provide Ecology with documentation of the basis for the determination or cessation of such activities. If Ecology disagrees with the PLPs' cessation of activities, it may direct the PLPs to resume such activities.

If Ecology concurs with or orders a work stoppage pursuant to this section, the PLPs' obligations with respect to the ceased activities shall be suspended until Ecology determines the danger is abated, and the time for performance of such activities, as well as the time for any other work dependent upon such activities, shall be extended for such period of time as Ecology determines is reasonable under the circumstances.

Nothing in this Order shall limit the authority of Ecology, or its employees, agents, or contractors to take or require appropriate action in the event of an emergency.

14. **Reservation of Rights/No Settlement**

This Order is not a settlement under Chapter 70.105D RCW. Ecology's signature on this Order in no way constitutes a covenant not to sue or a compromise of any Ecology rights or authority. Ecology will not, however, bring an action against the PLPs to recover remedial action costs paid to and received by Ecology under this Order. In addition, Ecology will not take additional enforcement actions against the PLPs regarding remedial actions required by this Order, provided the PLPs comply with this Order.

Ecology nevertheless reserves its rights under Chapter 70.105D RCW, including the right to require additional or different remedial actions at the Site should it deem such actions necessary to protect human health and the environment, and to issue orders requiring such remedial actions. Ecology also reserves all rights regarding the injury to, destruction of, or loss of natural resources resulting from the release or threatened release of hazardous substances at the Site.

15. **Transfer of Interest in Property**

No voluntary conveyance or relinquishment of title, easement, leasehold, or other interest in any portion of the Site shall be consummated by the PLPs without provision for

continued implementation of all requirements of this Order and implementation of any remedial actions found to be necessary as a result of this Order.

Prior to the PLPs' transfer of any interest in all or any portion of the Site, and during the effective period of this Order, the PLPs shall serve a copy of this Order upon any prospective purchaser, lessee, transferee, assignee, or other successor in said interest; and, at least thirty (30) days prior to any transfer, the PLPs shall notify Ecology of said transfer. Upon transfer of any interest, the PLPs shall restrict uses and activities to those consistent with this Order and notify all transferees of the restrictions on the use of the property.

**16. Compliance with Applicable Laws**

A. All actions carried out by the PLPs pursuant to this Order shall be done in accordance with all applicable federal state, and local requirements, including requirements to obtain necessary permits, except as provided in RCW 70.105D.090.

B. Pursuant to RCW 70.105D.090(1), the substantive requirements of Chapters 70.94, 70.95, 70.105, 77.55, 90.48, and 90.58 RCW and of any laws requiring or authorizing local government permits or approvals for the remedial action under this Order and that are known to be applicable at the time this Order becomes effective have been included as exhibit D and are binding and enforceable requirements of this Order.

The PLPs have a continuing obligation to determine whether additional permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial action under this Order. In the event either Ecology or the PLPs determine that additional permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial action under this Order, it shall promptly notify the other party of its determination. Ecology shall determine whether Ecology or the PLPs shall be responsible to contact the appropriate state and/or local agencies. If Ecology so requires, the PLPs shall promptly consult with the appropriate state and/or local agencies and provide Ecology with written documentation from those agencies of the substantive requirements those agencies believe are applicable to the remedial action. Ecology shall make the final

determination on the additional substantive requirements that must be met by the PLPs and on how the PLPs must meet those requirements. Ecology shall inform the PLPs in writing of these requirements. Once established by Ecology, the additional requirements shall be enforceable requirements of this Order. The PLPs shall not begin or continue the remedial action potentially subject to the additional requirements until Ecology makes its final determination.

Ecology shall ensure that notice and opportunity for comment is provided to the public and appropriate agencies prior to establishing the substantive requirements under this section.

C. Pursuant to RCW 70.105D.090(2) in the event Ecology determines that the exemption from complying with the procedural requirements of the laws referenced in RCW 70.105D.090(1) would result in the loss of approval from a federal agency which is necessary for the state to administer any federal law, the exemption shall not apply and the PLPs shall comply with both the procedural and substantive requirements of the laws referenced in RCW 70.105D.090(1), including any requirements to obtain permits.

#### 17. **Indemnification**

The PLPs agree to indemnify and save and hold the State of Washington, its employees, and agents harmless from any and all claims or causes of action for death or injuries to persons or for loss or damage to property arising from or on account of acts or omissions of the PLPs, and/or the PLPs' officers, employees, agents, or contractors in entering into and implementing this Order. However, the PLPs shall not indemnify the State of Washington nor save nor hold its employees and agents harmless from any claims or causes of action arising out of the negligent acts or omissions of the State of Washington, or the employees or agents of the State, in implementing the activities pursuant to this Order.

### **IX. SATISFACTION OF ORDER**

The provisions of this Order shall be deemed satisfied upon the PLPs' receipt of written notification from Ecology that the PLPs have completed the remedial activity

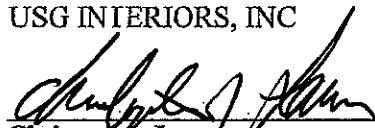
required by this Order, as amended by any modifications, and that the PLPs have complied with all other provisions of this Agreed Order

### **X. ENFORCEMENT**

Pursuant to RCW 70 105D 050 this Order may be enforced as follows:

- 1 The Attorney General may bring an action to enforce this Order in a state or federal court.
- 2 The Attorney General may seek, by filing an action, if necessary, to recover amounts spent by Ecology for remedial actions and orders related to the Site.
- 3 In the event the PLPs refuse, without sufficient cause, to comply with any term of this Order, the PLPs will be liable for:
  - A Up to three (3) times the amount of any costs incurred by the State of Washington as a result of its refusal to comply; and
  - B Civil penalties of up to \$25,000 per day for each day it refuses to comply.
- 4 This Order is not appealable to the Washington Pollution Control Hearings Board. This Order may be reviewed only as provided under RCW 70 105D 060.

USG INTERIORS, INC

  
Christopher Lawson  
Vice President, Manufacturing

7/11/06  
Date

PORT OF TACOMA

\_\_\_\_\_  
Timothy Farrell  
Executive Director

\_\_\_\_\_  
Date

STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

\_\_\_\_\_  
Rebecca S. Lawson, P.E.  
Regional Section Manager  
Toxics Cleanup Program  
Southwest Regional Office  
(360) 407-6241

\_\_\_\_\_  
Date

EFFECTIVE DATE OF THIS ORDER: \_\_\_\_\_

required by this Order, as amended by any modifications, and that the PLPs have complied with all other provisions of this Agreed Order

### X. ENFORCEMENT

Pursuant to RCW 70 105D 050 this Order may be enforced as follows:


- 1 The Attorney General may bring an action to enforce this Order in a state or federal court
- 2 The Attorney General may seek, by filing an action, if necessary, to recover amounts spent by Ecology for remedial actions and orders related to the Site
- 3 In the event the PLPs refuse, without sufficient cause, to comply with any term of this Order, the PLPs will be liable for:
  - A Up to three (3) times the amount of any costs incurred by the State of Washington as a result of its refusal to comply; and
  - B Civil penalties of up to \$25,000 per day for each day it refuses to comply
- 4 This Order is not appealable to the Washington Pollution Control Hearings Board. This Order may be reviewed only as provided under RCW 70 105D 060

USG INTERIORS, INC

\_\_\_\_\_  
Christopher Lawson Date  
Vice President, Manufacturing

PORT OF TACOMA

LOW PAMPHLET  
FOR

  
\_\_\_\_\_  
Timothy Farrell Date  
Executive Director

STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

\_\_\_\_\_  
Rebecca S. Lawson, P E Date  
Regional Section Manager  
Toxics Cleanup Program  
Southwest Regional Office  
(360) 407-6241

EFFECTIVE DATE OF THIS ORDER: \_\_\_\_\_